IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN T., A Minor by His Parents and Next Friends, Paul T. and Joan T., and PAUL T. AND JOAN T., Individually and on Their Own Behalf	:	**CIVIL ACTION**
v.	:	
THE DELAWARE COUNTY INTERMEDIATE UNIT, AND THE COMMONWEALTH OF PENNSYLVANIA	:	**No. 98-5781**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. November 7, 2001

In 1998, the parents of a young boy with Down's Syndrome filed this action against Delaware County Intermediate Unit ("DCIU") to compel it to provide their son John with special education services in his regular classroom at St. Denis, a private Catholic school. After a great deal of litigation, but without the appearance or prospect of a decision on the merits, plaintiffs now move to dismiss voluntarily their claims under Fed. R. Civ. Pro. 41(a)(2). This memorandum **GRANTS PLAINTIFFS' MOTION TO DISMISS WITH PREJUDICE,** and also dismisses the remaining pending matters: cross motions for counsel fees, cross-motions for expenses, plaintiffs' motion to reverse the findings of an administrative appeals panel, defendant's motion to join Haverford School District, and defendant's claims against Third Party Defendant Pennsylvania Department of Education ("PDE").

A. BACKGROUND

Plaintiffs brought claims under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), § 504 of the Rehabilitation Act, 29 U.S.C. § 794, 24 Pa. Cons. Stat. § 9-972.1 ("Act 89"), and 24 Pa. Cons. Stat. § 13-1372(4) ("13-1372(4)"); they alleged DCIU failed to provide mandated special education services to John T. at St. Denis.

Plaintiffs sought declaratory, injunctive, and compensatory relief, including preliminary and permanent injunctions compelling DCIU to provide speech therapy, occupational therapy, itinerant teaching services,[1] and a teacher's aide.[2]

By Opinion and Order dated May 8, 2000, the court issued a preliminary injunction requiring the DCIU to provide John T. with special educational services at St. Denis. John T. v. Delaware County Intermediate Unit, 2000 U.S. Dist. LEXIS 6169, 2000 WL 558582 (E.D.Pa. May 8, 2000). The court held the heightened standard of 24 Pa. Cons. Stat. § 1372(4) was incorporated into the IDEA and required the DCIU to provide John with the services requested.[3] The Order stated the preliminary injunction would be converted to a permanent injunction on May 26, 2000, unless

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[1] An itinerant teacher, by consulting with a child's classroom teacher, aids the classroom teacher in modifying the regular education curriculum to teach the child. Plaintiffs attested that an itinerant teacher would not be involved in teaching religion to John T.

[2] A teacher's aide is a one-on-one assistant working directly with the child, full time, to help the child perform in a mainstream classroom. A teacher's aide minimizes the burden on the classroom teacher of caring for the special needs of a disabled child; for example, a teacher's aide takes the disabled child out of the classroom for breaks and keeps the disabled child's classroom materials in order.

[3] This decision was explicitly based John's unique inability to attend public school. See John T., 2000 WL 558582, at * 6, 2000 U.S. Dist. Lexis 6169, at *20 (It was necessary for John T.'s special education services to "be provided at St. Denis because it is impossible for John T. to receive a proper education in the Coopertown public school.")(emphasis added). The state statute made the IU responsible for providing these services in this limited circumstance.

either party objected: the defendant objected, and filed an appeal which it later withdrew.

The plaintiffs pursued administrative review of John's proposed Individualized Education Plan ("IEP"). A hearing officer suggested the DCIU had threatened to cut off services to other St. Denis students in retaliation for this court's order. She also ordered the DCIU to modify the IEP to include better trained aides and full-time placement at St. Denis. However, an Appeals Panel reversing this decision found the proposed IEP was lawful.[4]

As a result of this administrative action, and the aborted appeal of the DCIU, the preliminary injunction was never converted to a permanent injunction. By September, 2001, John had returned to public school from St. Denis. On September 4, 2001, the court issued two orders. First, it found the DCIU in contempt of the preliminary injunction for its failure to provide John with certain educational services for the month of September, 2000: DCIU was ordered to pay $1100.00. (#66) Second, it vacated the preliminary injunction for changed circumstances. (#67)

Defendant's appeal of the contempt order is pending. Plaintiff has since moved for voluntary dismissal under Fed. R. Civ. Pro. 41(a)(2), and for counsel fees as a "prevailing party." Defendant opposes plaintiffs' motion to dismiss, and responds with a petition for fees and expenses of its own.

Admissions and statements made in plaintiffs' motion for

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[4] Neither party was satisfied with the Appeals Panel decision. The plaintiff has moved in this action to Transmit and Reverse the Findings of the Pennsylvania Special Education Appeals Panel (Paper #60). The defendant asserts that the proper way to appeal an Appeals Panel decision, which it wishes to do despite successfully reversing the hearing officer, is to bring a separate civil action. It filed such an action on April 5, 2001. See DCIU v. John T. et al., 01-1697. Motions to dismiss are pending therein, and will be addressed after filing this Opinion and Order.

voluntary dismissal make it possible to resolve all pending motions.

B. **DISCUSSION**

1. JURISDICTION

Plaintiffs bring claims under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), § 504 of the Rehabilitation Act, 29 U.S.C. § 794, 24 Pa. Cons. Stat. § 9-972.1 ("Act 89"), and 24 Pa. Cons. Stat. § 13-1372(4). The court has jurisdiction over the subject matter under 28 U.S.C. § 1331 and 1367(a): the parties do not contest personal jurisdiction: and venue lies in this district.

The DCIU's appeal of the court's contempt order is an appeal of a collateral matter, and does not divest the court of jurisdiction over the rest of the action. See New York State Nat. Org. for Women v. Terry, 704 F. Supp. 1247, 1255 (S.D.N.Y. 1989).

2. MOTION BY PLAINTIFFS FOR VOLUNTARY DISMISSAL(#70)

The Federal Rules of Civil Procedure permit voluntary dismissal after an answer or motion for summary judgment by an adverse party only by stipulation or court order. See Fed. R. Civ. Pro. 41(a). The dismissal may be with or without prejudice and "upon such terms and conditions as the court deems proper." Id. Granting a motion for voluntary dismissal is within the sound discretion of the trial court. See Ferguson v. Eakle, 492 F.2d 26, 28 (3d Cir. 1974). Rule 41 seeks to prevent a dismissal prejudicing the other parties by allowing the court to design conditions to cure any prejudice. See John Evans Sons, Inc. v.

Majik-Ironers, Inc., 95 F.R.D. 186 (E.D. Pa. 1982); see also Ferguson, 492 F.2d at 28 (purpose of Rule 41 is to put control of dismissals at late stage of litigation in the trial judge).

Often, dismissals under Rule 41(a)(2) are accompanied by curative conditions attempting to ensure defendants may recover some of the costs they expended in abandoned litigation. See John Evans Sons, 95 F.R.D. at 191. Defendants bereft of the ability to prevail on the merits are prejudiced: Rule 41(a)(2) enables the court to cure this prejudice.

In some circumstances, a court may attempt to cure defendants' injury by dismissing plaintiffs' claims with prejudice. This method: (1) ensures that defendants are not subject to duplicative litigation; and, (2) makes further curative conditions inappropriate "barring exceptional circumstances." John Evans Sons, 95 F.R.D. at 191.

Plaintiffs' motion for voluntary dismissal raises two issues: (a) should it be granted; and (b) should plaintiffs' claims be dismissed with or without prejudice.

(a) Voluntary dismissal under 41(a)(2)

Generally, a motion for dismissal "should not be denied absent substantial prejudice to the defendant." Johnston Development Group, Inc. v. Carpenters Local Union Co., 728 F. Supp. 1142, 1146 (D.N.J. 1990) (quoting Andes v. Versant Corp., 788 F.2d 1033, 1036 n. 4 (4th Cir. 1986)). In determining whether a voluntary dismissal is likely to result in substantial prejudice to the defendant, the factors to be considered include "the expense of a second litigation, the effort and expense incurred by a defendant in preparing for trial in the current case, the extent to which the current case has progressed, and plaintiff's diligence in bringing the motion to dismiss." Palmer v. Security National Bank, 2001 WL 877584, at * 1, 2001 U.S.

Dist. Lexis 11473, at *3 (E.D.Pa. June 13, 2001)(citing Maleski v. DP Realty Trust, 162 F.R.D. 496, 498 (E.D.Pa. 1995)).

Defendant argues that it will be prejudiced for two reasons: (1) DCIU has outstanding and unresolved claims pending for costs and expenses; and, (2) the DCIU has an unresolved claim against the PDE.

The DCIU's motion for fees and expenses was only filed in response to plaintiffs' motion for voluntary dismissal. The language of the rule does not contemplate prejudice created after submission of a motion for voluntary dismissal, e.g., "If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the action shall not be dismissed ..." Fed. R. Civ. Pro. 41(a)(2) (emphasis added). Although DCIU is not prejudiced by plaintiffs' voluntary dismissal for the purposes of Rule 41, the court will cure any theoretical prejudice by addressing, and denying, defendant's motion for reimbursement of expenses and fees in this opinion and order.

Defendant's third party claims have not moved beyond the third party defendant's Motion to Dismiss. PDE is a contingent defendant: if the DCIU were to lose, PDE is alleged to be liable for contribution or indemnity. If this action is dismissed without a finding of DCIU liability, and DCIU's claim against PDE is dismissed without prejudice, DCIU will be able to adjudicate PDE's liability in another action. DCIU's position seems to be that it is entitled to a ruling on PDE's duty to pay. However, this would wrongly transform a contingent claim for contribution or indemnity permitted under Fed. R. Civ. Pro. 14. The plaintiffs may not be forced to pursue this action simply because the defendant believes itself entitled to a "ruling": a party does not have a property interest in a judicial opinion. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S.

18, 26 (1994) (holding vacatur inappropriate when action made moot by settlement).

(b) Dismissal with or without prejudice

On page 2 of their memorandum in support of the motion, plaintiffs state:

> Inasmuch as John has transitioned to the public schools at an age when the transition is likely and expected to be successful, there is utterly no reason to expect that successive litigation would result from this dismissal. This conclusion is particularly compelling when one considers the extent of the pleadings, exhibits, and hearings caused by the DCIU's litigation strategy in this matter; quite simply, there is no reason for plaintiffs to seek further litigation with the DCIU in this matter ... In view of these circumstances, plaintiffs would have no objection to a dismissal of this action with prejudice upon payment of counsel fees.

This admission makes clear that plaintiffs contemplate a dismissal with prejudice.[5] A dismissal with prejudice may be granted "where it would be inequitable or prejudicial to defendant to allow plaintiff to refile the action." Chodorow v. Roswick, 160 F.R.D. 522, 523 (E.D.Pa. 1995). "The prejudice to defendant must be something other than the mere prospect of a second lawsuit." Id. (citing Miller v. Trans World Airlines, Inc., 103 F.R.D. 20, 21 (E.D.Pa. 1984)).

[5] There is authority in other circuits suggesting when plaintiffs seek dismissal without prejudice and a court dismisses with prejudice, plaintiffs should be given an opportunity to withdraw their motion. See, e.g., Stephen Duffy et al. v. Ford Motor Company, 218 F.3d 623, 632 (6th. Cir. 2000); Marlow v. Winston & Strawn, 19 F.3d 300, 304 (7th Cir. 1994). These cases are inapplicable: plaintiffs have agreed to dismiss with prejudice on "condition" of award of counsel fees. Plaintiffs can not define the conditions of a dismissal under 41(a)(2), designed to protect defendants. See John Evans Sons, 95 F.R.D. at 191. The court will permit plaintiffs the dismissal they have requested on the merits of their action; its decision on the collateral matter of plaintiffs' counsel fees is not a "condition" of the dismissal.

Allowing the plaintiffs to relitigate the matters already decided in this action would work severe prejudice on defendant. Plaintiffs' successes were: (1) a preliminary injunction; and (2) a partially successful action for contempt. If plaintiffs were allowed to withdraw and refile, defendants would be once again exposed to the potential for extended litigation. The reason plaintiffs give for dismissing the action, that the action is effectively moot, demonstrates why the dismissal must be with prejudice. Education actions, easily rendered moot, are particularly prone to strategic maneuvering by parties. The DCIU would be prejudiced if exposed to the threat of another expensive and possibly inconclusive lawsuit. Defendant has already expended an immense amount of time and effort: allowing plaintiffs to refile in these circumstances would be prejudicial. See Ellis v. Merrill Lynch & Co., 1989 WL 149757, at *4, 1999 U.S. Dist. Lexis 14720, at *10 (E.D.Pa. Dec. 6, 1989)(extent of defendant's efforts and the excessive expense of a second trial factors in determining whether to dismiss a complaint with prejudice); see also Chodorow, 160 F.R.D. at 523-24 (frivolous nature of second suit factor in determining whether to dismiss a claim with prejudice).

3. MOTION BY PLAINTIFFS FOR REIMBURSEMENT OF SPECIAL EDUCATION EXPENSES (#26)

On May 26, 2000, plaintiffs moved to be reimbursed $26,435.00 for aide services and occupational therapy paid after filing the Complaint but before the May 8, 2000, Order. Defendant opposed this motion.

Paragraph six of Plaintiffs' Motion for Voluntary Dismissal reads:

> [T]he purposes of this litigation have been fulfilled,

> with the exception of reimbursement to John's family for a time period prior to May 8, 2000, for services which they privately obtained and financed for John at St. Denis through a related settlement. The plaintiffs have decided to forego this reimbursement claim in view of their success in this matter and to avoid the time, potential expense, and emotional difficulties of litigating this very modest monetary claim, which claim was always secondary to obtaining appropriate educational services for John in a placement which was appropriate to meet all of his then-current needs.

This paragraph clearly refers to Plaintiffs' Motion #26: it will be deemed withdrawn.

4. MOTION BY PLAINTIFFS TO REVERSE THE FINDINGS OF THE APPEALS PANEL (#60)

On March 21, 2001, plaintiffs moved to Transmit and Reverse the Findings of the Pennsylvania Special Education Appeals Panel. Plaintiffs were concerned the appeals decision could "force John to be segregated from non-disabled peers for fully one-half of the school day in the upcoming school year [at St. Denis], a result which is wholly inappropriate, unnecessary and contrary to ... Oberti v. Board of Education of the Borough of Clementon School District, 995 F.2d 1204 (3rd Cir. 1993)" Mot. to Trs. and Rev. at ¶ 8.

Paragraph seven of plaintiffs' Motion for Voluntary Dismissal reads:

> The request of the plaintiffs that the Court review the decision of a state Special Education Appeals Panel ... is now effectively moot and need not be decided by this Court since no practical significance now attends to this decision, as John currently possesses an agreed-upon IEP in the Haverford Township School District.

This paragraph clearly refers to Plaintiffs' Motion #60: it will be denied as moot.

5. MOTION BY PLAINTIFFS FOR ATTORNEY'S FEES (#71)

On September 18, 2001, plaintiffs moved for counsel fees totaling $136,172.79. This motion is denied for three reasons: (a) plaintiffs dismissed with prejudice are not prevailing parties under 20 U.S.C. § 1415(i)(3)(B); (b) plaintiffs successes have not been on the merits; and, (c) it is impossible to separate the time incurred in the contempt proceedings from the litigation as a whole.

In a recent decision, the Supreme Court refined the definition of a "prevailing party" in fee-shifting statutes. The Court, in rejecting the "catalyst" theory, held that a "prevailing party" must have: (1) received a judgment on the "merits" of the litigation; or (2) obtained a court-ordered consent decree. See Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 121 S.Ct. 1835, 1841 (May 29, 2001). The court cited with approval Black's Law Dictionary's definition of a prevailing party: "[a] party in whose favor a judgment is rendered ... Also termed successful party." Id. at 1839, quoting Black's Law Dictionary 1145 (7th ed. 1999). Prevailing parties must have successfully obtained a "judicially sanctioned change in the legal relationship of the parties." Id. at 1840.

For the reasons articulated above, plaintiffs' claims will be dismissed with prejudice. A dismissal with prejudice "in effect grants judgment in favor of defendant at the request of the plaintiff; defendants are in the same position they would have been in had the trial occurred, except they save the additional costs of litigation." Horizon Unlimited, Inc. v. Richard Silva & SNA, Inc., 1999 WL 675469, at *2, 1999 U.S. Dist. Lexis 13320, at *8 (E.D.Pa. August 31, 1999). This situation is precisely the converse of that required to be a prevailing

plaintiff.

Plaintiffs did successfully obtain a preliminary injunction, and were able, in part, to prevail on their contempt motion. However, the former victory was not on the merits. See Oshiver v. Philadelpha Ct. of Com. Pls., Ct. Adm., 497 F. Supp. 416, 418 (E.D.Pa. 1980) (Pollack, J.) (refusing to award fees when plaintiff, having obtained a preliminary injunction, sought to collect a fee award). The court's findings about the IDEA, and the duties and rights it establishes, were preliminary and have been vigorously contested by the DCIU. Had there been a final judgment, DCIU might have had these findings reversed on appeal. Plaintiffs, had they been able to obtain final judicial relief on the merits of their claims, would have been entitled to fees under 20 U.S.C. 1415(i)3(B). They have foregone this opportunity by moving to dismiss.

Plaintiffs, attempting to distinguish Buckhannon Board, argue that IDEA cases contain unique incentives for settlement. Whether or not this is true, plaintiffs have not actually secured a judicially sanctioned change in the legal relationship between themselves and the defendant although they have obtained preliminary relief. Cf. Buckhannon Board, 121 S.Ct. at 1841. The DCIU was compelled to educate John by the court's order, but this temporary order did not change the relationship between the parties on the "merits."

Parts of plaintiffs' fee petition refer to their successful prosecution of a motion for contempt. However, the court could not separate those fees/expenses. Moreover, the contempt order is currently on appeal. Plaintiffs, should they successfully defend the contempt finding on appeal, may resubmit a motion for fees on that issue alone, and costs allowed by the Court of Appeals.

6. MOTION BY DCIU TO JOIN HAVERFORD TOWNSHIP (#62)

In its response to plaintiffs' Motion to Reverse the Administrative Appeals Panel, the DCIU sought to add Haverford School District as a Third Party Defendant because any order on this motion would "affect and bind the ... District despite the fact that [it] is not a party to these proceedings." Having granted plaintiffs' motion for voluntary dismissal, the motion to join Haverford School District will be denied as moot.

7. MOTION BY DCIU TO RECOVER EDUCATION EXPENSES (#74)

DCIU moves to recover $60,000.00 which it has allegedly expended to implement the Court's May 8, 2000, Order. It argues that because it will never have a chance to prevail on the merits, it should be allowed to recover in excess of the $5,000.00 bond the court set in its May 8 order. However, it cites no authority for the proposition it may retroactively increase the bond, but just states this result is necessary: (1) "in light of ... injustice and inequity"; and, (2) because it has no money to pay for these expenses.

Reimbursement of litigation expenses is authorized by Rule 41 to compensate the defendant for the cost of trial preparation if dismissal without prejudice prevents a final determination on the merits, but not when dismissal is with prejudice. See Horizon Unlimited, 1999 WL 675469, at *2; 1999 U.S. Dist. Lexis 13320, at *8. The cases defendant cites, involving dismissals without prejudice, are distinguishable. See Maleski, 162 F.R.D. at 498; Meltzer v. National Airlines, Inc., 31 F.R.D. 47, 49 (E.D.Pa. 1962). Awarding expenses on dismissal compensates defendants for wasted effort when plaintiffs are able to refile against them: this equitable consideration is not

present here.

Plaintiff's argue with some force that "DCIU's consistent over-litigation of all claims in this matter has severely prolonged an action which should have been decided upon cross - motions for summary judgment." Pls' Answer to New Matter, at ¶ 14. DCIU's litigation strategy has created much of the expense and delay in this action. DCIU has expended over $120,000 in counsel fees; by objecting to dismissal it seeks to expend even more. Its plea that it has no money to educate John is belied by the fact that the money has already been paid.

8. MOTION BY DCIU TO RECOVER COSTS AND COUNSEL FEES (#74)

DCIU seeks to recover "in excess of $120,000" in fees it has incurred in this litigation. It does not provide an itemized list of these fees, nor does it describe how much of the bill its insurance carrier has absorbed. The party seeking counsel fees bears the burden of proving that its request is reasonable. See Rode v. Dellarciprete, 892 F.2d 1177, at 1183 (3d Cir. 1990). To meet this burden, the fee petitioner must "'submit evidence supporting the hours worked.'" Id. (quoting Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983)). This motion must be denied on its face.

Even had the defendant itemized its fees, it still would not be entitled to recover. DCIU would not be able to recover counsel fees if it were successful at trial. The IDEA, at 20 U.S.C. § 1415(i)3(B), provides for fees for the prevailing parents only. No other statutory provision in this action appears to provide fees for the DCIU when the plaintiffs have brought non-frivolous claims. Plaintiffs' success in obtaining a preliminary injunction is prima facia evidence that their action was not frivolous.

Absent this statutory basis, "the court lacks the power to require an attorney's fee to be paid, barring exceptional circumstances." John Evans Sons, 95 F.R.D. at 191. There are no exceptional circumstances, such as fraud or sanctionable conduct by plaintiffs' attorneys, to justify departing from the "general practice of not awarding fees to a prevailing party absent explicit statutory authority." Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994).

9. DCIU'S CLAIMS AGAINST PDE

DCIU's third party claims against PDE are contingent on an award of damages to the plaintiffs. Such award is now precluded: DCIU's claims against PDE are moot and will be dismissed without prejudice.

C. **CONCLUSIONS OF LAW**

1. The court has subject matter jurisdiction under 28 U.S.C. § 1331: the parties do not contest personal jurisdiction: venue lies in this district.

2. Voluntary dismissal with prejudice is appropriate because plaintiffs have no expectation of refiling, and refiling would work prejudice on the defendant by forcing it to relitigate claims even if they would often not reach the merits.

3. Plaintiffs' motion to reverse the appeals panel is moot.

4. Plaintiffs' motion to recover special education expenses is withdrawn.

5. Plaintiffs are not prevailing parties on the merits under 20 U.S.C. 1915(i)3(B), and are not entitled to counsel fees.

6. Because plaintiffs' petition for fees is imprecise, that portion of their counsel fees arising from the contempt proceedings is impossible to segregate from the fees expended in the general litigation. The court will not award these fees without prejudice to a renewal petition if the contempt order is affirmed.

7. Defendant's motion to join Haverford Township School District as a Third Party Defendant is moot.

8. Defendant is not entitled to have its expenses reimbursed; judgment will be entered in favor of defendants and the DCIU does not require curative compensation for plaintiffs' dismissal of the action.

9. Defendant is not entitled to counsel fees because no statutory authority grants prevailing defendants fees and because no extraordinary circumstances exist under Fed. R. Civ. Pro. 41(a)(2).

10. Defendant's claims against the Pennsylvania Department of Education are moot and will be dismissed without prejudice.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN T., A Minor by His Parents and Next Friends, Paul T. and Joan T., and PAUL T. AND JOAN T., Individually and on Their Own Behalf	:	**CIVIL ACTION**
v.	:	
THE DELAWARE COUNTY INTERMEDIATE UNIT, AND THE COMMONWEALTH OF PENNSYLVANIA	:	**No. 98-5781**

AND NOW, this 7th day of November, 2001, in consideration of all outstanding motions, and for the reasons given in the forgoing memorandum, it is **ORDERED** that:

1. Plaintiffs' Motion for Voluntary Dismissal (#70) is **GRANTED. THIS ACTION IS DISMISSED WITH PREJUDICE.**

2. Plaintiffs' Motion for Counsel Fees (#71) is **DENIED.** Plaintiffs may submit a verified fee petition relating to its motion for Contempt **WITHIN TEN (10) DAYS OF AN AFFIRMANCE ON APPEAL.**

3. Plaintiffs' Motion to Transmit and Reverse Findings of the Pennsylvania Special Education Appeals Panel (#60) is **DENIED AS MOOT**

4. Plaintiffs' Motion for Reimbursement of Special Education Expenses (#26) is **DEEMED WITHDRAWN.**

5. Defendant's Motion to Recover Expenses, Counsel Fees, and Costs (#74) is **DENIED.**

6. Defendant DCIU’s claims against Third Party Defendant Pennsylvania Department of Education are **MOOT**, and are **DISMISSED WITHOUT PREJUDICE.**

7. The clerk shall mark this action closed.

Norma L. Shapiro, S.J.